EARTHJUSTICE

May 28, 2019

Rynda Kay
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Re: Docket ID No. EPA–R09– OAR–2019–0176

Dear Rynda Kay:

On behalf of the California Communities Against Toxics, Center for Community Action and Environmental Justice, Coalition for a Safe Environment, and the Natural Resources Defense Council, Earthjustice submits this comment on the proposed approval of the South Coast Air Quality Management District ("South Coast AQMD") incentive measures directed to heavy-duty trucks. This proposal seeks the first ever approval of a State Implementation Plan (SIP) measure for prospective incentive dollar investments. The proposal is unlawful, and therefore, EPA should disapprove it. The following sections outline the flaws with the proposed approval.

I. The South Coast Incentive Measure is Not Enforceable.

As EPA acknowledges, section 110(a)(2)(A) requires SIPs to include "enforceable" emission limitations and other control measures. To be "enforceable" a measure must be enforceable by the state, EPA and citizens. As EPA has explained: "A core principle of the CAA is that by taking action to approve an emission limitation into a SIP, the EPA thereby makes those emission limitations a federally enforceable component of the SIP that the state, the EPA, or citizens can thereafter enforce in the event of alleged violations."[1]

But mere approval into the SIP does not convert an unenforceable provision into an enforceable one. EPA's SIP approval must explain how the proposed measure can be enforced. "SIP provisions that operate to preclude enforcement by the EPA or citizens for violations, whether through impermissible exemptions or other SIP provisions that function to bar effective enforcement, not only undermine the enforcement structure of the CAA in a technical sense but undermine effective enforcement."[2]

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[1] EPA, Memo to Docket for rulemaking: "State Implementation Plans: Response to Petition for Rulemaking; Finding of Substantial Inadequacy; and SIP Calls to Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown, and Malfunction" (EPA-HQ-OAR-2012-0322) ("SSM Memo") at 7 (Feb. 4, 2013) at 7.

[2] SSM Memo at 24.

EPA's proposed approval of the South Coast Incentive Measure has not provided a legally defensible analysis of how this rule is enforceable. EPA's TSD lists some of the relevant criteria for assessing enforceability but then offers only conclusory discussion. EPA must answer the following:

(1) What is the violation?

Citizens and EPA can only enforce "violations." Citizens can commence civil actions for "a violation of (a) an emission standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation." CAA § 304(a)(1). EPA can enforce a "violation of any requirement or prohibition of an applicable implementation plan . . . ." § 113(a)(1).

Thus, the first question EPA must answer is what would constitute a violation of the SIP provisions being approved here. EPA suggests that EPA and citizens can enforce the commitments to achieve and report on emission reductions.[3] But EPA and the South Coast Rule muddy what exactly would constitute a violation. This is most evident in the so-called enforceable commitments listed on page 2 of the TSD.

First, EPA says CARB must "monitor" the District's implementation in accordance with the Carl Moyer Program Guidelines. This is a vague and unenforceable commitment. What would constitute a violation? How could one prove that CARB is not monitoring implementation in accordance with the guidelines. There is no means of measuring or independently verifying compliance because there is no reporting requirement, no deadline, etc. The reference to the 1300 repower and replacement projects, as discussed below, is a deliberate attempt to mislead the reader on what is actually required. Nothing, for example, in this monitoring "requirement" specifies that these projects actually need to occur.

The second commitment is to "achieve 1 ton per day of [NOx] emission reductions . . . by December 31, 2022." Nothing in this "commitment" specifies where these emission reductions must come from or even where they must occur. Nothing specifies whether they must be the result of some action by the agencies or merely the result of favorable economic conditions, which is exactly how CARB has claimed compliance with similar "commitments" in the past. There is no way for EPA or citizens to look at the entire emissions inventory for the South Coast (which is not actually specified as the correct standard for measuring compliance) on December 31, 2022 and determine whether CARB has achieved this emission reduction. Even if overall emissions increase between 2019 and 2022, CARB could still claim that but for some unspecified reason, those total emissions would have been 1 tpd higher. There is simply no way to prove that CARB has not achieved 1 tpd of NOx reductions. The commitment fails to define any possible violation and is not practicably enforceable.

The implication of the rule is that this emission reduction will come from the replacement of 350 drayage trucks, the replacement of 500 refuse trucks, and the repower of 450 refuse trucks, but this implication is deliberately misleading. Nothing in the rule commits CARB to achieve any

[3] TSD at 11.

truck replacements. These numbers are provided merely as "examples." This rule is a transparent attempt to undermine the entire framework of SIP enforceability. A SIP measure becomes nothing more than an open-ended commitment to figure out how to reduce emissions, with no actual enforceable commitment to action. The purpose of the SIP program is to compel states to identify the specific, enforceable actions they will take to reduce emissions. It is not enough for the state to merely promise to reduce emissions somehow and offer that citizens can sue the state if it fails.

The third "commitment" is to "provide publicly available reports." This is a throw away requirements. While it might be possible to show that CARB did not provide a report, the contents of the report are so vague that any document would likely pass muster. Again, the State must monitor compliance and project whether projects will achieve reductions on time, but there are no consequences, for example, if CARB finds noncompliance is rampant or there is no possibility that projects will achieve emission reductions on time. Moreover, as discussed below, the obligation to address any projected shortfall is dependent on EPA making a determination and cannot be enforced independently by citizens.

The final commitment to rectify shortfalls is triggered only if EPA makes a determination. Even if EPA were to make such a determination, there is no way for EPA or citizens to prove that CARB had failed to rectify the shortfall because there is no explanation of what that CARB action must do. CARB need only point to "substitute measures and/or rules" but these do not need to be new measures. CARB, as it has done in the past, can claim that other regulated sectors reduced emissions more than anticipated for whatever reason.

EPA's TSD notes that to be enforceable, "program violations [must be] defined." EPA must explain where in the South Coast Incentive Measure such definitions are provided.

(2) How could citizens independently verify compliance with these requirement?

As noted above, the lack of defined violations makes independent verification impossible. If CARB says it is "monitoring" implementation, there is no way for EPA or citizens to independently verify or prove otherwise. But this rule suffers from an even more fundamental problem around verification. The emission reductions to be achieved (in theory) will come from projects that neither EPA nor citizens can independently verify. EPA tries again to mislead in the TSD by claiming that the emission reductions can be "independently verified and enforced by CARB and the District." State enforceability alone, however, is not sufficient to demonstrate enforceability under the Act. These emission reductions must be independently verifiable by EPA and citizens.

The goal of the rule is to remove the requirement for enforceability against the actual sources by making CARB responsible for the emission reductions. The problem with this theory is that the "emission reductions" that CARB commits to achieve are measured only by CARB and the District, and cannot be verified by anyone else. If CARB claims that it has satisfied its 1 tpd commitment because the incentive program worked, there is no way for EPA or others to confirm that claim is in fact true. EPA and citizens cannot compel the trucking companies to support the data submitted to CARB and the District. EPA and citizens must trust that CARB

and the District have done their due diligence in verifying the data themselves, which is now not really in the interest of these agencies because they do not want to be on the hook for making up any shortfall. Likewise, if CARB claims that its substitute measures reduce emissions by whatever the shortfall, again, there is nothing in the rule that ensures anyone else could verify that claim.

EPA's approach separates the emission reduction obligation from the emitter, and makes the (theoretically) liable party in charge of determining compliance. There is no way that compliance with the emission reduction commitment can be independently verified by EPA or citizens. CARB is given the ability to deem itself in compliance with no possibility for others to challenge that determination.

(3) What is the penalty for noncompliance?

The lack of defined violations is most apparent when trying to describe what penalties could be assessed or what corrective action could be compelled by a court. For example, assume CARB were found in violation of the 1 tpd commitment, would CARB be subject to daily penalties until it achieved that reduction? Could it be compelled to adopt some replacement measure by the court? How would such a suit in equity be handled under the 11th Amendment? Or does the commitment to rectify the shortfall upon an EPA determination negate any such court intervention? Is EPA the arbiter of whether the substitute measures are adequate? If so, there is effectively no penalty for violating the 1 tpd commitment. The only recourse is to repeatedly challenge EPA for arbitrarily letting CARB and the District fail to clean the air, which is not subject to remedies under 113 of the Clean Air Act.

What is the penalty for failing to monitor implementation? How would a court determine days of violations? Same for inadequate reporting? These are not practicably enforceable commitments because the violations are not actually defined.

EPA should explain exactly how a violation of these various commitments could be proved and enforced, and what the judicial remedy would be for citizens bringing an enforcement action. In doing so, EPA should explain why no one has ever been able to enforce similar State emission reduction commitments in the past and why this rule is different.

II. EPA's Attempt to Add New Flexibility and Circumvent the Protections of the Statute Cannot be Reconciled with the Act.

EPA's proposed approach creates a new type of "black box" for National Ambient Air Quality Standards other than ozone and without the conditions required under CAA section 182(e)(5). Like the black box, CARB and the District are now allowed to promise to reduce emissions without actually making any enforceable commitments as to how. But unlike the black box, which at least requires actual contingency measures to be adopted and in place years before the compliance date, there are no actual backstops in place to make up for a shortfall. EPA must explain why Congress would have allowed such an approach after clearly providing only limited flexibility in section 182(e)(5).

One solution could be requiring the fleet replacement and repowering requirements as mandates that have been adopted by CARB and are in place to become effective upon the failure of the voluntary program to achieve the specified numbers of vehicle turnovers. This provides a measureable target and an enforceable backstop, unlike the proposed approach.

III. The EPA has not Demonstrated these "Reductions" are Surplus.

EPA's proposal also has not demonstrated that reductions that result from the Carl Moyer funds are surplus. The TSD defines surplus as those reductions that -

> are not already required by or assumed in the same attainment plan, any other adopted State air quality program, a consent decree, or a federal rule designed to reduce emissions of a criteria pollutant or its precursors (*e.g.,* a new source performance standard or federal mobile source requirement).

TSD, at 4. In the present situation, the EPA has not demonstrated that these reductions are not required to be achieved in the same attainment plan. In fact, the plan adopted for the South Coast in 2017 includes billions of dollars in incentive commitments already. Further, it includes many measures called further deployment of cleaner technologies, which will likely rely on incentives.

Moreover, the South Coast Air Quality Management District's section 185 fee rule for failure to attain the 1-hour ozone standard includes an "equivalency" determination. The EPA has not articulated whether all or a portion of these Carl Moyer fees are being used to cover that obligation. Earthjustice submitted a public records act request to the ARB and AQMD for the annual compliance reports required to be submitted to the ARB and EPA under South Coast Rule 317, but it has not received responsive documents yet. To the extent these documents have not been created, EPA cannot move forward because it cannot truly demonstrate that Carl Moyer funds are surplus.

IV. The Proposed Rule Violates the EPA's Limitations on Use of Voluntary Measures in a SIP.

EPA has also not shown how this approval, in addition to the other approvals for the SIP, comply with the limitations placed on use of voluntary programs. The EPA has determined that the limitations on use of voluntary measures to meet attainment obligation is as follows:

> [t]he presumptive limit is 6 percent of the total amount of emission reductions required for the ROP, RFP, attainment, or maintenance demonstration purposes. The limit applies to the total number of emission reductions that can be claimed from any combination of voluntary and/or emerging measures, including those measures that are both voluntary and emerging.[4]

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[4] EPA, *Incorporating Emerging and Voluntary Measures Into a State Implementation Plan*, (September 2004), at p 9.

In the present situation, the SIP for the South Coast includes more than 6 percent of total emissions for ROP, RFP, and attainment from emissions reductions from voluntary measures (ie voluntary incentive programs like Carl Moyer). When coupled with the emerging measures in the plan, the South Coast plan dramatically exceeds this total restricted 6 percent of necessary emissions to meet ROP, RFP, and attainment. The EPA has failed to explain how approving this proposal complies with its restrictions on overreliance on voluntary programs.

EPA may be trying to get around this restriction by wrongfully classifying the Carl Moyer program as an "Economic Incentive Program" ("EIP"). The program does not even meet the EPA's definition of an EIP. In fact, EPA has stated "[g]enerally speaking, economic incentive programs meeting EPA's EIP guidance differ from voluntary measures in that emission or pollutant reductions (or actions leading to reductions) must be enforceable against sources."[5] Because this program is not enforceable against the sources themselves, it is not an Economic Incentive Program, but rather a voluntary program. In fact, on line one of the Carl Moyer fact sheet produced by ARB, it describes the program as "a voluntary grant program."[6]

We appreciate your consideration of these comments, and we respectfully request that the EPA reject this proposal. Please do not hesitate to contact us if you have questions about these comments.

Sincerely,
Adriano L. Martinez

[5] *Id.* at 5.
[6] ARB, Carl Moyer Fact Sheet, *available at* *https://www.arb.ca.gov/msprog/moyer/factsheets/moyer_program_fact_sheet.pdf.*